In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-731

JOHN DAVID LINDSTROM, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner and a co-defendant were indicted for receiving and selling 79 stolen United States postal money orders in violation of 18 U.S.C. 641. After a hearing on a pre-trial motion to suppress held in the United States District Court for the Southern District of Florida, the motion was denied. Upon petitioner's request that the jury trial be waived and his stipulation that the testimony adduced at the hearing would be identical to the testimony at trial, the court found him guilty as charged and placed him on probation for a period of one year. The court of appeals affirmed *per curiam* without opinion (Pet. App. 1).

The evidence showed that petitioner and Fred

Smith, an informant, met by chance at a gun shop on January 11, 1972 (Tr. 62–63). The two men had known each other for several months (Tr. 60). During the course of their conversation Smith inquired whether petitioner had "anything going" (Tr. 64). Petitioner replied that he knew of someone who had $100,000 in American Express traveler's checks (Tr. 64, 94).[1] At that time petitioner was under the mistaken belief that the stolen property consisted of traveler's checks rather than United States postal money orders (Tr. 94). Expressing an interest in a possible transaction, Smith requested that petitioner get in touch with the possessor of the goods (Tr. 64, 65).

Petitioner's own testimony revealed that he had learned of the stolen merchandise from his brother-in-law at least one week before seeing Smith on January 11. Petitioner had heard his brother-in-law mention someone who had $10,000 worth of stolen money orders. The record reflects the following testimony of petitioner on this matter (Tr. 97–98):

> Q: Did you inquire about that to [your brother-in-law]?
>
> A: Well, no. He told me to remember a phone number, which I did.
>
> Q: Why did he ask you to do that?
>
> A: Well, he figured if I was interested in it, it probably was my business.
>
> * * * * *

[1] Petitioner's account of that conversation indicated that when asked if he had "anything going," his response was: "At first, I answered, 'No.' We talked for a few more minutes, and I said, 'I might be able to get a hold of $10,000 worth of American Express money orders, but I am not sure' " (Tr. 94).

Q: Did you ever call the number?
A: Yes.
Q: When?
A: Oh, a short time later.
Q: This is approximately a week or two before having this conversation with Joe Smith?
A: I would imagine it was a week.

Petitioner wrote down the telephone number of the suggested contact for future reference (Tr. 99, 100). It was through this connection that the money orders were eventually obtained (Tr. 100).

On the evening of January 11, the date of the initial encounter at the gun shop, Smith visited the office of Sergeant Watts of the county narcotics department and, after relating his earlier conversation with petitioner, was told to arrange a meeting and bring back some sample checks for Watts' inspection (Tr. 13, 65, 66). Smith asked petitioner about making further arrangements; petitioner answered that he would see what could be done (Tr. 67). During the next week Smith had several more talks with petitioner to find out if there were any new developments and told him that they could both make money by consummating the deal (Tr. 67, 68). Petitioner never indicated a desire to abandon the scheme; nor did Smith ever coerce him into cooperation (Tr. 76, 77).

On January 17, 1972, after hearing from petitioner that the goods would soon be available, Smith again communicated with Sergeant Watts, who told him to get some samples and deliver them to his office (Tr. 68, 69). Smith met with petitioner and a Mr. Pacetti

on the evening of January 18, 1972[2] and carried out Watts' instructions (Tr. 69, 70). A sample item obtained from Pacetti and later delivered to Watts established that the stolen property was actually United States postal money orders (Tr. 14, 22, 103). Smith made a telephone call from Watts' office to Rogers Tavern and instructed petitioner and Pacetti to continue waiting for him there while he collected money for payment (Tr. 17, 18).

Later that evening Smith and Watts joined petitioner and Pacetti at the tavern, which petitioner had designated as the place where the rest of the checks would be transferred to the purchasers (Tr. 70, 77). Watts—pretending to be Smith's accomplice—expressed a desire to buy the stolen goods (Tr. 73). Watts advised petitioner that he only had $600 but that someone was bringing him an extra $400 (Tr. 22). Petitioner said, "Okay, no problems. As soon as you get the money, let me know, and then we will have to get the items" (Tr. 22). Shortly thereafter a detective working in an undercover capacity arrived with the cash (Tr. 44), and petitioner retrieved from the trunk of a car a sack containing the rest of the stolen money orders (Tr. 24–26, 77). The transaction was finally completed inside of the automobile, which petitioner was driving (Tr. 25, 44). Pacetti received the pay-off money and handed petitioner $100 (Tr. 34, 46, 74). At a designated spot near the tavern Watts signalled from within the car to a group of officers who moved in for the arrest.

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[2] Petitioner and Pacetti had never met each other personally until that night (Tr. 88).

1. Petitioner contends that the evidence established the defense of entrapment as a matter of law. Viewed in the light most favorable to the government, the evidence that the jury was entitled to credit fails to support this contention.

As this Court pointed out in *Sherman* v. *United States*, 356 U.S. 369, 372, "the fact that government agents 'merely afford opportunities or facilities for the commission of the offense does not' constitute entrapment. Entrapment occurs only when the criminal conduct was 'the product of the creative activity' of law-enforcement officials," citing *Sorrells* v. *United States*, 287 U.S. 435, 441, 451. The principal limitation on government activity is that its officials not "implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute." *Sorrells, supra*, 287 U.S. at 442. In the instant case the trier of fact heard ample evidence of petitioner's "predisposition" to commit the crime. Even before the government informant appeared on the scene, petitioner had shown a keen interest in learning how to reach the eventual supplier of stolen money orders. When asked in general whether he had "anything going," petitioner freely volunteered information about a specific supply of stolen goods and, after a promise of remuneration, helped make arrangements for the sale. In short, petitioner was a willing and active participant who was largely responsible for setting this scheme in motion. Accordingly, the suggestion that petitioner was not "predisposed" to commit the offense has no support in the record of this

case. See *Osborn* v. *United States*, 385 U.S. 323, 331–332.[3]

We note that the government has recently sought review of three decisions by courts of appeals involving entrapment issues. These decisions (*United States* v. *Russell*, 459 F. 2d 671 (C.A. 9), certiorari granted October 16, 1972, No. 71–1585; *United States* v. *McGrath*, No. 71–1791 (C.A. 7), petition for certiorari pending, No. 72–761, and *United States* v. *Knight*, No. 72–965, petition for certiorari filed January 8, 1973) raise substantially different problems from the instant case, and the facts in this case do not complement those cases in a way that would invite collective consideration.

The issue in *McGrath*, *Russell* and *Knight* is whether the defense of entrapment may be asserted by one who was predisposed to commit the offense on the ground that the degree of governmental participation in the illicit enterprise is an independent and con-

[3] Relying on *Greene* v. *United States*, 454 F. 2d 783 (C.A. 9), petitioner seemingly argues that even if resort to the entrapment defense is precluded by criminal predisposition, a similar doctrine—that of "creative activity" by government agents—requires a reversal of the conviction (Pet. 6–7). While we believe *Greene* to conflict with the entrapment decisions of this Court, since the defendants there had a prior disposition to commit the offense, the case does not support petitioner's position since it is factually distinguishable from his case. In *Greene* government involvement included the construction of an illegal still and its operation over a prolonged period of time, all accompanied by government inducement and veiled threats of physical injury. *Greene* involved a degree of government activity far more "intense and aggressive" than that present here (454 F. 2d at 787).

trolling criterion.[4] The instant case involves no such additional consideration; it involves solely the classic issue of predisposition. Indeed, the central issue here—whether predisposition has been shown on this evidence—is merely factual, and does not warrant further review.

2. Petitioner also contends that he was denied procedural due process and deprived of the effective assistance of counsel by the operation of the Fifth Circuit's Local Rule 18, which allows a transfer of

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[4] All three cases involve far more extensive governmental involvement than petitioner's case. In *McGrath* government agents infiltrated a complicated scheme to print counterfeit bills and participated in its implementation. Particularly offensive to the court of appeals was the fact that agents manufactured the money, delivered it, and then arrested the recipient for possession of contraband. In *Russell* an undercover agent proposed an arrangement whereby the defendant and his accomplices, already suspected of dealing in methamphetamines, would produce methamphetamine and the agent would supply a chemical ingredient without which the drugs could not be produced. The court of appeals sustained the defense of entrapment principally because of its conclusion that the chemical ingredient supplied by the undercover agent was virtually unavailable through other channels. The court determined that "Russell would have been powerless to 'commit' the charged offenses without the Government's pervasive intervention" (459 F.2d at 672–673). In *Knight* the court of appeals found a violation of due process where a government informant acted as a conduit in a "controlled" delivery of heroin to the defendant from an illegal source. These cases bear little relation to the facts in the present case, where the extent of the government's participation was to ask petitioner whether he had "anything going", to express continuing interest after petitioner readily gave a specific affirmative response, and to provide a willing buyer of the stolen goods—an element necessary for completion of the crime, but not even claimed to be otherwise unobtainable.

cases to the summary calendar when the court concludes that oral argument is not justified (Pet. 8–10). The court of appeals placed petitioner's case on the summary calendar only after determining that the record and submitted briefs provided a sufficient basis for an informed disposition. See, generally, *Isbell Enterprises, Inc.* v. *Citizens Casualty Co. of New York,* 431 F. 2d 409 (C.A. 5); *Payton* v. *United States,* 425 F. 2d 1324 (C.A. 5), certiorari denied, 400 U.S. 957. Petitioner had the assistance of counsel in preparing his appellate brief and was placed at no unfair disadvantage by the court's decision. We note that this Court has recently denied certiorari in other cases where it was similarly claimed that a summary disposition violated constitutional rights. See *Revel* v. *United States,* 455 F. 2d 608 (C.A. 5), certiorari denied, 407 U.S. 922; *United States* v. *Bays,* 448 F. 2d 977 (C.A. 5), certiorari denied, 405 U.S. 957.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

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